



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

NICK LYON
DIRECTOR

May 17, 2016

Dear provider:

The Centers for Medicare and Medicaid Services issued a new rule for Medicaid waiver programs that offer home and community-based services. The federal rule affects home and community-based service programs that are authorized under the 1115, 1915 (b)(3), 1915 (c), 1915 (i), or 1915 (k) sections of the Social Security Act. The federal rule establishes new requirements for characteristics that home and community-based settings must have in order to receive Medicaid funding.

The Michigan Department of Health and Human Services (MDHHS) must assess settings under the following four waivers for compliance with the characteristics outlined in the federal rule:

- MI Choice Waiver Program
- Habilitation Supports Waiver Program
- MI Health Link HCBS Waiver Program
- Managed Specialty Services and Supports Waiver

As part of the assessment process, MDHHS has been working the Bureau of Community and Health Systems and the Bureau of Fire Services within the Department of Licensing and Regulatory Affairs (LARA) to address issues related to licensing of Adult Foster Care homes and Homes for the Aged. Stakeholders have raised questions about whether state licensing rules conflict with the characteristics outlined under the federal rule. In particular, stakeholders have questioned whether the federal requirements conflict with state licensing requirements on the following issues:

- Lockable Doors
- Visiting Hours
- Residency Agreements and State Landlord-Tenant Law
- House Rules
- Choice of Providers
- Freedom of Movement
- Choice of Roommate
- Access to Earned Income

After reviewing the relevant laws and regulations, MDHHS and LARA have determined that the requirements under the federal rule and state licensing rules are in alignment for the aforementioned issues. As part of this review, MDHHS and LARA are issuing the following guidance to stakeholders. This guidance supersedes the earlier guidance that was issued on August 6, 2015.

For additional questions regarding the home and community-based services rule change or the setting compliance process, please email HCBSTransition@michigan.gov.

Thank you for your attention to this matter.



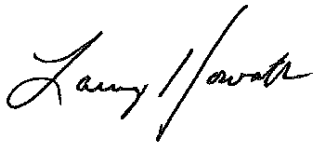
Richard C. Miles
Director, Bureau of Medicaid Policy and Health System Innovation
Department of Health and Human Services



Thomas J. Renwick
Director, Bureau of Community Based Services
Department of Health and Human Services



Julie Secontine
State Fire Marshal
Department of Licensing and Regulatory Affairs



Larry Horvath
Director, Bureau of Community & Health Systems
Department of Licensing and Regulatory Affairs

INTRODUCTION

The Centers for Medicare and Medicaid Services issued a new rule for Medicaid waiver programs that offer home and community-based services. The federal rule affects home and community-based service programs that are authorized under the 1115, 1915 (b)(3), 1915 (c), 1915 (i), or 1915 (k) sections of the Social Security Act. The HCBS Final Rule establishes new requirements for characteristics that home and community-based settings must have in order to receive Medicaid funding.

The Michigan Department of Health and Human Services (MDHHS) must assess settings under the following four waivers for compliance with the characteristics outlined in the HCBS Final Rule:

- MI Choice Waiver Program
- Habilitation Supports Waiver Program
- MI Health Link HCBS Waiver Program
- Managed Specialty Services and Supports Waiver

All settings that provide Home and Community-Based services under these three waivers must come into compliance with the rule: settings cannot be grandfathered into compliance with the rule.

As part of the assessment process, MDHHS has been working with the Bureau of Community and Health Systems and the Bureau of Fire Services within the Department of Licensing and Regulatory Affairs (LARA) to address issues related to licensing of Adult Foster Care homes and Homes for the Aged. Stakeholders have raised questions about whether state licensing rules conflict with the characteristics outlined under the final rule. In particular, stakeholders have questioned whether the federal requirements conflict with state licensing requirements on the following issues:

- Lockable Doors
- Visiting Hours
- Residency Agreements and State Landlord-Tenant Law
- House Rules
- Choice of Providers
- Freedom of Movement
- Choice of Roommate
- Access to Earned Income

After reviewing the relevant laws and regulations, MDHHS and LARA have determined that the requirements under the final rule and state licensing rules are in alignment for the aforementioned issues. As part of this review, MDHHS and LARA are issuing the following guidance to stakeholders.

KEY TERMS AND ASSOCIATED ACRONYMS

The following key terms and associated acronyms are used in this document:

Term	Acronym	Definition
Michigan Department of Health and Human Services	MDHHS	MDHHS is the Department within the State of Michigan that is responsible for administering the Michigan Medicaid Program. MDHHS is also responsible for implementing the Home and Community-Based Services Final Rule.
Michigan Department of Licensing and Regulatory Affairs	LARA	LARA is responsible for safeguarding Michigan's citizens through a simple, fair, efficient and transparent regulatory structure.
Bureau of Fire Services	BFS	BFS is the bureau within LARA that is responsible for ensuring facilities are constructed and maintained in accordance with the Life Safety Code.
Bureau of Community and Health Systems	BCHS	BCHS is the bureau within LARA that is responsible for licensing and certifying facilities and agencies including licensing of Adult Foster care facilities and Home for the Aged Facilities.
Centers for Medicare and Medicaid Services	CMS	A federal agency within the United States Department of Health and Human Services that works in partnership with State governments to administer the Medicaid program.
Medicaid Waiver Program		A waiver program is an approach that a State Medicaid Agency can use to test new or existing ways to deliver and pay for health care services using Medicaid funding.
Home and Community Based-Services Final Rule	HCBS Final Rule	The HCBS Final Rule establishes new federal requirements for different Medicaid authorities that allow States to provide home and community-based long term services and supports to eligible persons. The rule requires Medicaid Waiver Programs to ensure that waiver participants have full access to benefits of community living and opportunity to receive services in the most integrated settings.
State Licensing Administrative Rules		Rules developed by LARA in accordance with the law in order to ensure the safety of residents in HFA and AFC facilities.
State Landlord-Tenant Law		State landlord-tenant law governs the rental of commercial and residential property. For the purposes of this document, the definition of state landlord-tenant law includes but is not exclusively limited to (1) MCL 554.631 to 554.641; and (2) MCL 600.5701 to 600.5759.

Term	Acronym	Definition
Adult Foster Care Home	AFC	<p>“Adult foster care congregate facility” means an adult foster care facility with the approved capacity to receive more than 20 adults to be provided with foster care.</p> <p>“Adult foster care family home” means a private residence with the approved capacity to receive 6 or fewer adults to be provided with foster care for 5 or more days a week and for 2 or more consecutive weeks. The adult foster care family home licensee shall be a member of the household, and an occupant of the residence.</p> <p>“Adult foster care large group home” means an adult foster care facility with the approved capacity to receive at least 13 but not more than 20 adults to be provided with foster care.</p> <p>“Adult foster care small group home” means an adult foster care facility with the approved capacity to receive 12 or fewer adults to be provided with foster care.</p>
Home for the Aged	HFA	<p>“Home for the aged” means a supervised personal care facility, other than a hotel, adult foster care facility, hospital, nursing home, or county medical care facility that provides room, board, and supervised personal care to 21 or more unrelated, non-transient, individuals 60 years of age or older. Home for the aged includes a supervised personal care facility for 20 or fewer individuals 60 years of age or older if the facility is operated in conjunction with and as a distinct part of a licensed nursing home.</p>
Service Plan		<p>Service plans may also be known as “Assessment Plans”, “Plans of Care”, “Person-Centered Plans”, “Individual Plans of Service”, or “Integrated Individualized Care and Supports Plans”.</p>
Residency Agreement		<p>A residency agreement is a written, legally-enforceable agreement between a landlord and tenant that outlines the terms for renting a residential property. A residency agreement must be in compliance with state-landlord tenant law unless the residential setting is regulated under other statutes such as state licensing laws. A residency agreement may also be known as a “Lease”.</p>

Term	Acronym	Definition
Resident Care Agreement		<p>A resident care agreement is the document which is established between the resident or the resident's designated representative, the responsible agency, if applicable, and the licensee and which specifies the responsibilities of each party. A resident care agreement shall include all of the following:</p> <p>(a) An agreement to provide care, supervision, and protection, and to assure transportation services to the resident as indicated in the resident's written assessment plan and health care appraisal.</p> <p>(b) A description of services to be provided and the fee for the service.</p> <p>(c) A description of additional costs in addition to the basic fee that is charged.</p> <p>(d) A description of the transportation services that are provided for the basic fee that is charged and the transportation services that are provided at an extra cost.</p> <p>(e) An agreement by the resident or the resident's designated representative or responsible agency to provide necessary intake information to the licensee, including health-related information at the time of admission.</p> <p>(f) An agreement by the resident or the resident's designated representative to provide a current health care appraisal as required by subrule (10) of this rule.</p> <p>(g) An agreement by the resident to follow the house rules that are provided to him or her.</p> <p>(h) An agreement by the licensee to respect and safeguard the resident's rights and to provide a written copy of these rights to the resident.</p> <p>(i) An agreement between the licensee and the resident or the resident's designated representative to follow the home's discharge policy and procedures.</p> <p>(j) A statement of the home's refund policy. The home's refund policy shall meet the requirements of R 400.14315.</p> <p>(k) A description of how a resident's funds and valuables will be handled and how the incidental needs of the resident will be met.</p> <p>(l) A statement by the licensee that the home is licensed by the department to provide foster care to adults.</p> <p>(7) A department resident care agreement form shall be used unless prior authorization for a substitute form has been granted, in writing, by the department. A resident shall be provided the care and services as stated in the written resident care agreement.</p>

Term	Acronym	Definition
Foster Care		“Foster care” means the provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, 5 or more days a week, and for 2 or more consecutive weeks for compensation.
Medicaid-Funded Home and Community-Based Services		Services and supports that are offered through a Home and Community-Based Services Waiver program reimbursed by Medicaid.
Lockable Door		A lockable door is a side-hinged, permanently mounted door that is equipped with positive-latching, non-locking-against-egress hardware. The hardware must be able to be opened from the inside of a room with a single motion; such as a turn of a knob or push of a handle, even if the door is locked.
Provider-Owned and Controlled		A provider-owned and controlled setting is a setting that is owned or controlled by a Prepaid Inpatient Health Plan, Community Mental Health Service Provider, or contracted provider. A residential setting may be provider-owned and controlled if the waiver participant lives in a private residence that is owned or controlled by the Prepaid Inpatient Health Plan, Community Mental Health Service provider, or the contracted provider.
House Rules		House rules means those rules which are established by the licensee and which constitute expectations for resident conduct.
Earned Income		Earned income is income received from another person or organization or from self-employment for duties that were performed for remuneration or profit. Some rental income is considered earned.
Unearned Income		Unearned income is all income that is not earned.

LOCKABLE DOORS

The Home and Community-Based Services (HCBS) Final Rule requires residential settings to offer units that have bedroom and bathroom doors that are lockable by the individual, with only appropriate staff having keys to doors. Both the Bureau of Fire Services and the Bureau of Community and Health Systems allows Adult Foster Care (AFC) homes and Homes for the Aged (HFA) to have bedroom and bathroom doors that are lockable from the inside of the room. In order to meet both the HCBS Final Rule and AFC/HFA licensing requirements, the bedroom door shall be equipped with a side-hinged, permanently mounted door that is equipped with positive-latching, non-locking-against-egress hardware (hardware that can be opened from the inside of a room with a single motion; such as a turn of a knob or push of a handle, even if the door is locked).

This requirement also applies to bathroom doors. In accordance with the AFC/HFA licensing requirements, staff must have a key to the bedroom or bathroom door if the individual has a lockable door.

The associated licensing rules for bedroom and bathroom doors are as follows: R 400.1430 (2), R 400.1431 (3), R 400.14407 (3) and R 400.14408 (4) R 400.15407 (3) and R 400.15408 (4).

Exceptions to the HCBS Final Rule may apply in the following circumstances:

1. the individual has an assessed need that would be addressed by having a different hardware on the door;
2. the need is identified and documented in the individual's person-centered plan or assessment plan;
3. the modification is made based upon the individual's need instead of the setting's requirements; and
4. the modification meets all other pertinent state and federal regulatory requirements.

VISITING HOURS

The HCBS Final Rule requires residential settings to allow individuals to have visitors of their choosing at any time. In the responses to public comment, the Centers for Medicare and Medicaid services stated that "...it would be reasonable for there to be limitations on the amount of time a visitor can stay as to avoid occupancy issues. Such limitations should be clearly stated in a lease, residency agreement, or other form of written agreement."

Based on this guidance, MDHHS interprets the requirement as follows: settings are permitted to set visiting hours in partnership with individuals who are receiving services if the visiting hours are clearly stated in a lease, residency agreement, or other form of written agreement. The visiting hours must apply to all residents of the settings and must also be flexible to allow for special circumstances (e.g., family members or friends who work and cannot participate during regular visiting hours). Restricted and alternative visiting hours should be documented in the individual's person-centered plan or assessment plan. The documentation of the restriction must meet all requirements as outlined in the HCBS Final Rule.

After also comparing this interpretation to existing state requirements, MDHHS and LARA have agreed that this interpretation complies with rules R 400.1409 (1)(K), R 400. 14304 (1)(k), and R 400. 15304 (1)(k) as outlined by the Bureau of Community and Health Systems (BCHS). These

rules state that residents have the right to have contact and reasonable visiting time; and any exceptions should be covered in the individual's written assessment plan.

RESIDENCY AGREEMENT AND STATE LANDLORD-TENANT LAW

The HCBS Final Rule states that settings must have several “qualities” in order to be considered home and community-based. More specifically, a residential setting that is provider-owned or controlled must demonstrate the following quality:

The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

Stakeholders have inquired about how the federal requirement to have a legally enforceable residential agreement applies to licensing settings such as Adult Foster Care (AFC) homes and Homes for the Aged (HFA). Additionally, stakeholders have also asked for clarification on whether the rights and protections under state licensing rules are comparable to rights and protections under state landlord-tenant laws.

After reviewing state licensing rules and state landlord-tenant laws, MDHHS and LARA have determined that the federal requirement to have a legally enforceable residential agreement does apply to licensed settings where individuals receive Medicaid-funded home and community-based services. MDHHS and LARA also agreed that AFC homes and HFA homes must have a residential agreement that offers comparable benefits to state landlord-tenant law in order to meet the requirements of the federal rule.

MDHHS has also determined that current state licensing rules offer comparable benefits to state landlord-tenant laws for the purposes of the HCBS Final Rule. More specifically, MDHHS determined that current state licensing rules offer comparable protections to state landlord-tenant laws on issues related to discharge processes and complaints for licensed settings. Because current state licensing rules offer comparable protections to state landlord-tenant laws, a residency agreement for a licensed setting that meet the requirements of state licensing rules may also meet the requirements of the HCBS Final Rule if the residency agreement includes information on discharge processes and complaints.

Based on these findings, MDHHS and LARA have determined that AFC homes and HFA homes may use residency agreements to meet the requirements of state licensing rules and the HCBS Final Rule under the following conditions:

- **AFC Homes:** State licensing rules require AFC homes to use the BCAL-3266 Resident Care Agreement form. MDHHS and LARA have agreed that the BCAL-3266 form meets the requirements of the HCBS Final Rule if the licensee also provides information on discharge processes and complaints to the resident. MDHHS and LARA have also created a supplemental document, known as the “Summary of Resident Rights: Discharges and Complaints”, which could be used by an AFC home in conjunction with BCAL-3266 form to meet the requirements of state licensing rules and the HCBS Final Rule. Licensees may still use their own residency agreements if the residency agreement outlines the relevant discharge and complaints processes and meets all applicable state and federal requirements.

- HFA Homes: State licensing rules do not require HFA homes to use a specific document as a residency agreement. MDHHS and LARA have agreed that licensees may design and use their own residency agreements to meet the federal requirement if the residency agreement outlines the relevant discharge and complaints processes and meets all applicable state and federal requirements. MDHHS and LARA have also agreed that licensees could use the Summary of Resident Rights: Discharges and Complaints document to fulfill the state and federal requirement to outline relevant discharge and complaint processes.

After also comparing this interpretation to existing state requirements, MDHHS and LARA have agreed that this interpretation complies with rules R 400.14301(6), 400.15301(6), and R 400.1407(5) as outlined by the Bureau of Community and Health Systems (BCHS).

The BCAL-3266 form and Summary of Resident Rights: Discharges and Complaints document can be found online at the following locations:

Name of the Document	Location
BCAL-3266	www.michigan.gov/lara >> Community and Health Systems >> Adult Foster Care >> Resident Care Agreement BCAL-3266
Summary of Resident Rights: Discharges and Complaints	www.michigan.gov/mdhhs >> Assistance Programs >> Health Care Coverage (Click on the tab) >> Home and Community-Based Services Program Transition

HOUSE RULES

The HCBS Final Rule states that settings must have several “qualities” in order to be considered home and community-based. One of the qualities is that a home and community-based setting “...optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.” (§ 441.301 (c)(4)(iv)) Additionally, a residential setting that is provider-owned or controlled must demonstrate that “...any modification of the additional conditions, under § 441.301(c)(4)(vi)(A) through (D), must be supported by a specific assessed need and justified in the person-centered service plan.” (§ 441.301 (c)(4)(vi)(F))

Stakeholders have inquired about how this portion of the HCBS Final Rule intersects with state licensing requirements. In particular, stakeholders have asked whether the ability of licensed settings to set “house rules” under state licensing rules conflicts with the requirement under the federal rule for individuals to control their own schedules and activities. “House rules” are defined as “...those rules which are established by the licensee and which constitute expectations for resident conduct.” (R400.15102 (1)(l))

Licensed residential settings such as an Adult Foster Care homes and Homes for the Aged can set “house rules” and still be in compliance with the HCBS Final Rule. In order for house rules to be in compliance with the state licensing and federal rule, the house rules must have the following requirements:

1. A copy of the house rules must be provided to the resident at admission to the setting.
2. The rules should be responsive to the needs of the residents within the setting.
3. Requirements under the house rules which would limit or restrict the ability of an individual to control his or her own schedule or activities must be supported by specific assessed needs of residents within the setting and justified in the service plan.

4. Requirements under the house rules which would limit or restrict the ability of an individual to control his or her own schedule or activities must meet all other pertinent state and federal regulatory requirements.

After also comparing this interpretation to existing state requirements, MDHHS and LARA have agreed that this interpretation complies with rules R 400.1407(10), R 400.15102 (1)(l), R 400.15301 (6)(g), and R 400.15302 (2) as outlined by the Bureau of Community and Health Systems (BCHS). The licensing rules state that settings can set “house rules”. The licensing rules also state that residents have the right to receive a copy of the house rules and that house rules cannot conflict with state licensing rules.

CHOICE OF PROVIDERS

In many AFC homes and HFAs, the provider of services is the same entity as the owner of the setting. Some stakeholders have contended that this arrangement conflicts with the requirements of the HCBS Final Rule.

The HCBS Final Rule does not expressly prohibit the provision of services in provider-owned and/or controlled settings. The HCBS Final Rule only requires that they be assessed for compliance with the Home and Community-Based characteristics as outlined under the HCBS Final Rule. One of these characteristics is that participants must be offered a choice of providers within the waiver program. A participant could choose a setting that offers services from a specific provider under the following conditions:

1. The participant is offered an array of options in terms of where he or she will receive services by his or her service agency.
2. If the participant chooses a setting where a specific provider offers services, the participant should also be informed by his or her service agency that he or she may be choosing a specific provider by choosing that specific setting.
3. The participant should also be provided with information by his or her service agency about how to select a new provider and setting if he or she desires.
4. The participant may also use private funds to reimburse other providers for additional services such as skilled therapies and other assistance.

MDHHS and LARA have determined that this approach complies with state licensing rules.

Specific Licensing Rule Citations: LARA has not identified any state licensing rules that specifically address this issue.

FREEDOM OF MOVEMENT

State licensing rules allow for settings to require supervision or place restrictions on the freedom of movement of residents or in accordance with the individual’s service plan. Some stakeholders have contended that this requirement conflicts with the requirement under the HCBS Final Rule to allow individuals have freedom of movement within and outside of the setting.

The HCBS Final Rule does include a requirement that individuals should not be unnecessarily restricted in their movement within and outside of the setting. However, the HCBS Final Rule also allows for providers to work with individuals and make “modifications” to the service plan to address specific assessed needs of the individual. Modifications must be based on the specific

assessed needs of the individual, must be identified and documented in the individual's person-centered plan or assessment, must be based on the individual's needs instead of the setting's requirements, and must meet all other pertinent state and federal regulatory requirements.

If an individual has a specific assessed need that would be best served by requiring supervision or placing restrictions on the ability of the individual to move around or outside of the setting, a provider should work with the individual to document any potential modifications to the service plan that would address the specific assessed need. A provider could make this modification and still be in compliance with the HCBS Final Rule if the modification meets all requirements that are outlined above.

MDHHS and LARA have determined that this approach complies with state licensing rules.

Specific Licensing Rule Citations: Rule 408, MCLA 400.707(7), MAC R 400.1707(2)(a), and R 400.14301(2)(a)

CHOICE OF ROOMMATE

Residents in many AFC homes and HFAs have an option of choosing to live with a roommate. State licensing rules allow for licensees to restrict the choice of roommate if the two individuals are judged to be "incompatible". Some stakeholders in Michigan have contended that this practice conflicts with the HCBS Final Rule.

The HCBS Final Rule does require home and community-based settings to allow the individual to have a choice of roommate. However, CMS indicated in a Frequently Asked Questions document that the provider may make modifications for this requirement as follows:

An individual's rights, including but not limited to roommates, visitors, or with whom to interact, must be addressed as part of the person-centered planning process and documented in the person-centered plan. Any restrictions on individual choice must be focused on the health and welfare of the individual and the consideration of risk mitigation strategies. The restriction, if it is determined necessary and appropriate in accordance with the specifications in the rule, must be documented in the person-centered plan, and the individual must provide informed consent for the restriction.

An individual's choice of roommate and room may be limited by the availability of open rooms within the individual's chosen residential setting. The landlord for the setting should discuss potential options for rooms and roommates with the participant prior to completing the residency agreement.

If two participants of opposite genders would like to be roommates and live together in a licensed setting, the participants may request a "rule variance" from LARA. LARA will evaluate and potentially approve rules variances as appropriate.

MDHHS and LARA have determined that this approach also complies with state licensing rules.

Specific Licensing Rule Citations: MAC R 400.1407(2)(c), R 400.14301(2)(c)

ACCESS TO EARNED INCOME

The HCBS Final Rule requires that individuals be able to control their own resources including personal funds. Some stakeholders have questioned whether this requirement would conflict with the ability of licensees to control or set restrictions on a resident's access to personal funds. More

specifically, some stakeholders asked whether a provider could restrict access to earned income through employment and still be in compliance with state licensing rules and the HCBS Final Rule.

A resident's income may be divided into two categories: earned income and unearned income. Earned income is income received from another person or organization or from self-employment for duties that were performed for remuneration or profit. Some rental income is considered earned income. Unearned income is all income that is not earned income (e.g. Supplemental Security Income, Social Security Disability Insurance).

State licensing rules do not permit a licensee to restrict access to earned income. A provider may offer a safe location for a participant to store earned income, but the provider must make provisions for individuals to access their earned income when desired as part of this arrangement. This arrangement does not conflict with the requirement under the HCBS Final Rule for individuals to be able to control their own resources.

Specific Licensing Rules Citation: MAC R. 400.1407(5), MAC R 400.1407(5), R 400.14301(6)(k), and R 400.14315(3), Rule 315, Rule 1421